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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 26

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 872

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee, Commonwealth of Virginia, at the relation of H. G. Shirley, Highway Commissioner, submits this statement and motion pursuant to paragraph 3 of Rule 12 of the Revised Rules of this Court, effective September 1, 1932.

Report of the Opinion Appealed From.

The opinion of the Supreme Court of Appeals of Virginia rendered January 12, 1933, from which appeal is sought, is reported under the style "*Southern Railway Company* v. *Commonwealth*," in 167 S. E. (S. E. Adv. Shs. Vol. 167, No. 6, March 2, 1933, pages 578-583, inclusive). Citation in the Virginia official reports is not yet available.

Appellee's Statement of Matters and Grounds Making Against the Jurisdiction of this Court.

The power here challenged with respect to the elimination of grade crossings was conferred upon the State Highway Commissioner in substantially the same form of procedure in the year 1924 (Acts of Assembly, 1924, Chap. 120, page 146; Michie's Code of 1924 (unofficial), Sec. 3974*a*). There were amendments not here material in 1926 (Acts of Assembly 1926, Chap. 213, page 397; Michie's 1926 Suppl. Sec. 3974*a*).

The statute in the precise form here under attack was approved and enacted February 27, 1930 (Acts of Assembly, 1930, Chapter 62, page 73; also cited Michie's Virginia Code of 1930 (unofficial), Section 3974*a*).

The appellant's attack upon this statute as presented before the State Corporation Commission of Virginia and upon appeal therefrom in the Supreme Court of Appeals of Virginia, was upon two distinct grounds, namely:

(1) That the said statute was unconstitutional for the reason that it undertook to delegate to the State

Highway Commissioner legislative powers of a character which cannot be delegated; and

(2) That the said statute was unconstitutional for the reason that it made no provision for notice to the railroad and an opportunity to be heard on the point whether or not the particular grade crossing was to be eliminated.

In appellant's petition for appeal to this Court, in its assignment of error and in its jurisdictional statement, the appellant does not segregate these two points of attack but makes reference to both points in combined form.

1. Appellant's First Point Presents no Federal Question.

No federal question is presented or involved under point one, for the reason that if the Commonwealth of Virginia has the power through any branch of its government to accomplish the result complained of, then the form and manner by which the result is accomplished is clearly within the discretion of the State authorities, free of federal control.

The delegation is to the Highway Commissioner, who constitutes an administrative department of the Commonwealth, created by and acting under statutory authority, and exercising police power conferred by statute (Code 1930, Sections 1969*a*-1969*p*). This police power is conserved by Section 159 of the Constitution of Virginia, providing that

> "the exercise of the police power of the State shall never be abridged, nor so construed as to

> permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State."

And by Section 164 of the Constitution of Virginia, it is provided:

> "The right of the Commonwealth, *through such instrumentalities as it may select*, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor shall never be surrendered or abridged."

On these points reference is made to the published opinion of the court below, at pages 579 and 582.

The pertinency of Section 164 of the Virginia Constitution, above quoted, is apparent when the language of *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 225, is considered:

> "We shall assume that when * * * a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned."

It is not appellee's position that the power here delegated is either legislative or judicial, but merely a legally delegated administrative discretion. But in view of the Virginia Constitution, both might be granted, and granted together, without raising any federal question.

The proposition that appellant's first point, as above stated, presents no federal question finds support in one of the leading grade crossing elimination cases:

Erie R. R. Co. v. *Public Util. Commrs.*, 254 U. S. 394, at page 413:

> "This Court has no concern with the question how far legislative or *quasi*-legislative powers may be delegated to a commission or board."

2. No Jurisdiction of Appellant's Second Point.

Appellant's second point of attack is that the Virginia statute denies due process of law required by the Fourteenth Amendment of the United States Constitution. The appellant does not claim that the Commonwealth of Virginia lacks substantive power, but on the contrary expressly admits it. Appellant's point is that no provision is made for due process of law in what the appellant calls the primary or procedural sense; which in brief, is simply that the statute makes no provision for *notice* and a *hearing* upon the question whether the particular crossing shall be eliminated. The statute does make full provision for notice and hearing in a court proceeding upon the design, cost and details of the proposed construction to accomplish separation of the grades.

The appellant admits that *the legislature* of the Commonwealth may, *without notice or hearing,* make a direct legislative determination to eliminate a grade crossing. This admission has been made throughout the briefs in the courts below and is specifically pointed out and quoted in the published report of the opinion appealed from on page 580.

This admission of appellant is doubtless intended also to apply to such procedure without notice or hearing by a subordinate legislative body for example, a municipal council. But it is interesting to note that no such *admission* was made by the railroad in *Chicago, Burlington and Quincy Railroad* v. *Nebraska,* 170 U. S. 57, where the delegation was to the mayor and council of Omaha City. There the railroad claimed that such procedure was (page 76) "arbitrary, without notice and contrary to plain principles of justice and equality." But this Court held (page 76) that the council "was not directed to proceed judicially, but to exercise a legally delegated discretion," and that neither notice nor a hearing were prerequisites (p. 77).

As to what constitutes due process of law in such cases there is no difference in principle between direct legislative action, either by the legislature or a subordinate legislative body, such as a city council, on the one hand, and, on the other, action by delegation to an administrative *board or official* of legal discretion to ascertain a state of facts upon which the operation of the statute depends, conformably to a legislative guide. The admission of the appellant that power resides in the Commonwealth of Virginia to eliminate a grade crossing by *direct legislation,* without notice or hearing, is tantamount to an admission that no federal question is involved in this case.

That there is no difference in principle, so far as due process of law is concerned, between these two methods of proceeding, is shown by the following authorities:

Woodruff v. *Catlin*, 54 Conn. 277, 295:

> "That the legislature of this State has the power to do all this * * * and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

The above case and quotation were approved in *New York & New England R. Co.* v. *Bristol*, 151 U. S. 556, 567. In that case the delegation of discretion was not to a subordinate legislative body but to a board of railroad commissioners, an administrative body. The railroad strongly urged that this board "prejudged" the case, that there was no notice given or hearing accorded on the point whether the particular crossing should be eliminated, that for lack of notice and a hearing the claim that it had its day in court was "a hollow mockery." (See 151 U. S. at pages 564 and 565.) This Court said (page 571) that railroads are subject to legislative control in all respects necessary to protect the public, and

> "the State has power to exercise this control through boards of commissioners; * * * nor are they (railroads) thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and (that) the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this Court on the ground of an infraction of the Constitution of the United States."

Also *Health Dept. of the City of New York* v. *Trinity Church*, 145 N. Y. 32; 27 L. R. A. 710, 713:

> "If, in such case, the enforcement of the direct command of the legislature were not to be preceded by any hearing * * * no provision of the state or federal constitution would be violated. The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle nor would it be necessary to provide that the board should give notice and afford a hearing * * * before it made such order."

This leading New York case has been approved *on this point* by *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57, 76, 77, the passage we have quoted from the New York case being quoted with approval on page 77. It is plain that no difference exists between legislation, direct or through a city council, and delegation of discretion to an administrative board. The requirements of due process are the same and in neither case is notice or hearing a prerequisite.

3. No Taking of Private Property is Here Involved.

The enforcing of police regulations of this character does not involve any *taking* or depriving of property, and therefore no notice or hearing is required by the due process clause of the Fourteenth Amendment. See published report of the opinion of the lower court at page 582.

The point is also passed on in *Mugler* v. *Kansas*, 123 U. S. 623, 668:

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. * * * Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. * * * The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."

To the same effect:

Detroit, etc., R. Co. v. *Osborn,* 189 U. S. 383;

Chicago, etc., R. Co. v. *Tranbarger,* 238 U. S. 67;

Northern Pacific R. Co. v. *Puget Sound, etc., R. Co.,* 250 U. S. 332;

New Orleans Public Service Co. v. *New Orleans,* 281 U. S. 682.

The case last cited was a grade crossing regulation case and the following is from page 687 of the opinion:

> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law (citing cases)."

4. There is no Showing Against this Police Regulation.

In *Erie R. R. Co.* v. *Public Util. Commrs.*, 254 U. S. 394, it was said of the elimination of railroad grade crossings on pages 410, 412:

> "That is one of the most obvious cases of police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires * * *. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil."

Being an obvious exercise of police power in the interest of the public safety, all that is required is that the means employed have a substantial relation to the purpose to be accomplished, and that there be no *arbitrary* interference with private rights; *Missouri, etc., Co.* v. *Omaha*, 235 U. S. 121.

The same idea is thus expressed in the recent case of *New Orleans Public Service* v. *New Orleans*, 281 U. S. 682, 686:

> "The burden is upon the appellant to show that *having regard to the facts disclosed by the record,* removal of the existing viaduct and construction of the crossings are so clearly *unreasonable* and *arbitrary* as to amount to depriving the appellant of its property without due process of law."

The public safety is so closely related to the elimination of grade crossings that to elaborate would be to labor the obvious. The substantial relation of the means employed to the purpose to be accomplished is apparent.

There is no basis whatever in this record to suggest any *arbitrary* exercise of the legally delegated discretion. The record consists of the complaint of the Highway Commissioner and the *demurrer* of the appellant railway thereto. No evidence was taken and there is no basis whatever in the record either to sustain or to suggest any arbitrary or unreasonable exercise of the power. It is in the arguments of counsel alone that we find any suggestion of "personal" or "arbitrary" exercise of power; or any suggestion that either the means employed or the results sought have any feature of unreasonableness or hardship upon the railroad, much less spoliation or confiscation of property.

5. Appellant's Cases Differentiated.

Consideration of well recognized distinctions readily differentiates the cases on which appellant relies:

1. A distinction is to be drawn between controversies between man and man in which the proceedings are

judicial in character, and cases where the government through one of its established agencies is exercising the police power.

Cooley, Cons. Lim. (8th ed.), pp. 740, 741;
Breiholz v. *Pocahontas County,* 257 U. S. 118.

This distinguishes the following cases relied on by appellant:

Tracy v. *Ginzberg,* 205 U. S. 170;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413;
Truax v. *Corrigan,* 257 U. S. 312;
Small v. *Sugar Refining Co.,* 267 U. S. 233.

A corollary distinction between delegation to private persons (or delegation to whim or fancy without any legislative guide whatever), and delegation to an agency of government, serves to distinguish the zoning ordinance cases:

Eubank v. *Richmond,* 226 U. S. 137;
Washington ex rel.; &c., v. *Roberge,* 278 U. S. 116.

2. Wholly different considerations apply in cases where there is *a taking* of private property for public use, from those applicable where there is a proper exercise of the police power.

We have already given the authorities.

This distinguishes appellant's cases where there was a taking or depriving of property, such as where spurs, additional trackage or other facilities are required:

Missouri P. R. Co. v. *Nebraska*, 217 U. S. 196;
Washington ex rel., &c., v. *Fairchild*, 224 U. S. 510;
Chi., M. & St. P. R. Co. v. *Board*, 76 Mont. 305.

As was said in *Washington ex rel., &c.*, v. *Fairchild*, *supra*, an order requiring the railroad to make a track connection was "not a mere administrative regulation, but it was a taking of property."

3. The delegation of purely arbitrary discretion without legislative guide or standard is very different from delegating a legal discretion with such a guide or standard (though it be expressed in very general terms).

See

Thompson v. *Smith*, 155 Va. 367, 381;
Mutual Film Corpn. v. *Ohio Indus. Com.*, 236 U. S. 239.

This differentiates appellant's cases:

Yick Wo v. *Hopkins*, 118 U. S. 356;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Small v. *Sugar Refining Co.*, 267 U. S. 233;
Connally v. *Gen. Cons. Co.*, 269 U. S. 285;
Cline v. *Frick Dairy Co.*, 274 U. S. 445;
Chi., M. & St. P. R. Co. v. *Board*, 76 Mont. 305.

4. There is a distinction to be noted between the power to regulate inherent or common rights, such as the conduct of an ordinary business, and power to regulate extraordinary privileges, where the right is derived *ex gratia*.

This elementary principle needs no authority (see *Gundling* v. *Chicago*, 177 U. S. 183, 187, distinguishing *the Yick Wo case; Cutrona* v. *Mayor*, 14 Del. 208, making same distinction; also *Thompson* v. *Smith*, 155 Va. 367, 378), yet it serves as a complete differentiation of the following authorities cited by appellant:

Yick Wo v. *Hopkins*, 118 U. S. 356;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Cline v. *Frick Dairy Co.*, 274 U. S. 445;
Marx v. *Maybury*, 36 F. (2d) 397.

5. Rate making powers and the procedure whereunder they are exercised follow well settled principles. Common carriers are in such matters *deprived* of property, as distinguished from merely regulated in the use of property. Whether judicial or legislative in nature, or both (Cf. *Chi., M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458, judicial, with *Prentis* v. *A. C. L.*, 211 U. S. 210, 226, legislative), it is clear that the principles of procedure are rather analogous to additional trackage requirements and tax proceedings than to mere police regulations having to do with mode of use. No one would now question that both notice and opportunity to be heard are required in this class of cases.

Yet the following rate making cases are cited by appellant:

Chi. M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418;
Smythe v. *Ames*, 169 U. S. 466;

Chi., M. & St. P. R. Co. v. *Tompkins*, 176 U. S. 167;
Interstate Com. Com. v. *L. & N. R. Co.*, 227 U. S. 88;
Oklahoma Operating Co. v. *Love*, 252 U. S. 331;
Wichita R., &c., Co. v. *Pub. Util. Com.*, 260 U. S. 48.

6. Taxation and police regulation are wholly different. The former takes unoffending property and appropriates it to public use; the latter takes no property but regulates its use so as to prevent offense. "The assessment of a tax is action judicial in its nature;" *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127, 138. Multiplication of authorities is useless.

The taxation cases cited by appellant are wholly aside from the mark:

Parsons v. *District of Columbia*, 170 U. S. 45;
Security Trust & Sav. Co. v. *Lexington*, 203 U. S. 323;
Central Georgia R. Co. v. *Wright*, 207 U. S. 127;
Embree v. *Kansas City, &c., Dist.*, 240 U. S. 242;
Withnell v. *Ruecking Cons. Co.*, 249 U. S. 63;
Turner v. *Wade*, 254 U. S. 64;
Browning v. *Hooper*, 269 U. S. 396;
Brinkerhoff-Faris Tr. Co. v. *Hill*, 281 U. S. 673.

In the foregoing classification we have undertaken to distinguish, on one or more grounds, each of the cases upon which appellant relies to sustain its contention that the Virginia statute under attack is repugnant to the Fourteenth Amendment.

Conclusion of Statement Opposing Jurisdiction.

It is respectfully submitted that the propriety of delegating discretion of this kind to an administrative department of the State involves no federal question; and it is further submitted that upon this record there is no showing whatever, or any attempt to show, anything unreasonable, arbitrary or confiscatory in the police regulation promulgated. And in the absence of such showing by the record no question of due process of law under the Fourteenth Amendment is presented.

Appellee's Motion to Dismiss or Affirm.

The appellee moves the court to dismiss or affirm upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

It has for many years been the established legislative and judicial policy of the Commonwealth of Virginia to eliminate all grade crossings whenever and as soon as it is reasonably practicable to do so. See published reports of the opinion of this case in the court below, page 579. *All grade crossings are under the potential ban of the policy and statute.* Realizing that it is both financially and physically impossible to eliminate all such crossings at once, the statute has delegated to the State Highway Commissioner, the administrative arm of the state having control of highways, authority to determine in his official capacity when in the interest of public safety or convenience any particular crossing is to be eliminated. This delegates to this administrative branch of the government neither legislative nor judicial power, but merely the

duty to exercise a legally delegated discretion in conformity with the legislative guide expressed in the statute; *Chicago, etc., R. R.* v. *Nebraska,* 170 U. S. 57, 76:

> "The latter (that is, the city council) was not directed to proceed judicially but to exercise a legally delegated discretion."

The case is in no way analogous to the taxation, rate fixing, or additional trackage cases relied on by appellant, which involve the *taking* of private property in proceedings of judicial nature; nor to the other cases relied on, where an arbitrary power is delegated, under no legislative guide whatever, to regulate an ordinary business and interfere with inherent rights. The police regulation here involves no *taking* of property, no *judicial* hearing on the point of elimination, and regulates not an ordinary business or an inherent right but one derived *ex gratia.* The instant case is rather analogous to *Breitholz* v. *Pocahontas County,* 257 U. S. 118, where power was delegated to a board to determine without notice or hearing when repairs to a drainage system are necessary; or to the administrative regulations approved in *Morris* v. *Duby,* 274 U. S. 135, in which power was delegated to the State Highway Commission of the State of Oregon to fix maximum weights and speeds of vehicles on highways. Peculiarly applicable here is the following from the case last cited, page 144:

> "In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the highway commission upon this question which is committed

to their decision as against merely general averments denying their official finding."

Grade Crossing Elimination Cases.

But arguments by analogy are unnecessary here. The principles laid down as applicable to cases of this precise character amply support the statute of Virginia and the procedure adopted thereunder. Examination of these cases demonstrates that there is nothing of novelty in this appeal. It involves questions already definitely and repeatedly determined. It is necessary only to cite the grade crossing cases in which the very questions here raised have been decided by this Court against the appellant's contention. In these cases many other points upon which the railroads have unsuccessfully endeavored to rely have also been disposed of, such as impairment of the obligation of contracts, in the charter or elsewhere, interference with interstate commerce, and the like—none of which are here relied on or involved:

New York, etc., R. R. Co. v. *Bristol,* 151 U. S. 556;

C. B., etc., R. R. Co. v. *Nebraska,* 170 U. S. 57;

Northern Pacific R. Co. v. *Duluth,* 208 U. S. 583;

St. Paul, etc., R. Co. v. *Minnesota,* 214 U. S. 497;

C., I. & W. R. Co. v. *Connersville,* 218 U. S. 336;

Chicago, etc., Ry. v. *Minneapolis,* 232 U. S. 430;

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548;

Great Northern R. Co. v. *Clara City,* 246 U. S. 434;

Erie R. R. Co. v. *Public Util. Commrs.,* 254 U. S. 394;

Southern Ry. Co. v. *Durham*, 266 U. S. 178;
Lehigh Valley R. Co. v. *Board of Public Utility*, 278 U. S. 24;
New Orleans Public Service v. *New Orleans*, 281 U. S. 682.

Consideration of the principles laid down in these grade crossing elimination cases by this Court amply justify this motion to dismiss or affirm the present appeal. In the earlier cases it was vigorously asserted by the railroads that notice and a hearing was required and had been denied them but it was expressly held that no notice or hearing was required. The point has not been urged in the later cases. It was embalmed in the earlier cases and should not be revived.

We have not found, nor has appellant cited, any grade crossing elimination case which either holds or intimates that previous notice and an opportunity to be heard is a constitutional requirement before such a police regulation may be promulgated.

This Case is Upon a Demurrer.

The instant case arises upon the complaint of the Commonwealth of Virginia, at the relation of the State Highway Commissioner, filed in the State Corporation Commission of Virginia. This complaint makes among others the following allegations:

> "(2) The undersigned relator pursuant to the powers vested in him and duties imposed upon him by law, and particularly pursuant to the provisions of an act of the General Assembly of Virginia approved February 27, 1930, identified as Chapter 62, Acts 1930, amending

and re-enacting previously existing acts of the same and similar purport, has in his official capacity ascertained and determined that the existing crossing at grade of State Highway Route 12, Project 460-E, by the railroad owned and/or operated by the Southern Railway Company near Antlers, Mecklenburg County, Virginia, should be eliminated and an overhead crossing substituted therefor, and that the elimination of such existing crossing at grade and the substitution therefor of an overhead crossing is necessary for the public safety and convenience,, and pursuant thereto, notified, in writing the said Southern Railway Company stating particularly the point at which the existing grade crossing is to be eliminated and that the public safety and convenience required that the said existing grade crossing be eliminated and a crossing above the tracks of the said railroad constructed. • • •

"(3) The elimination of the said crossing at grade and the substitution therefor of an overhead crossing had been for some time a subject of negotiation between your relator in his official capacity and the said railroad company, and the said railroad company had pursuant to and in the course of such negotiations prepared and submitted to your relator plans for the said work which were approved by your relator. In compliance with the aforesaid act of the General Assembly of Virginia, your relator under date of January 7, 1931, submitted to the said Southern Railway Company plans and specifications of the proposed work, they being the same as theretofore submitted by the said railroad company and approved by your relator."

To this complaint the appellant interposed a demurrer, thereby admitting all the allegations of the complaint. The appellant stands upon this demurrer. No evidence was offered showing or tending to show that the ruling was "personal," or "arbitrary," or "oppressive," or that the expense involved was out of proportion to the result to be accomplished. It is upon this record that the case here stands. That the ruling was arbitrary, oppressive or confiscatory does not appear and is not even suggested by the record. In fact the statute itself provides a very practical consideration which negatives any such idea, namely: The Commonwealth is to bear one-half of the expense attendant upon the separation of the grades.

In order to seek the protection of the due process clause of the Fourteenth Amendment the burden of proof is upon the appellant to show that the requirement of the Highway Commissioner made pursuant to the statute is utterly unreasonable, arbitrary, oppressive and confiscatory. No attempt in this record has been made by the appellant to bear this burden. Certainly it cannot be carried by the mere interposition of a demurrer. Every presumption is in favor of the validity of the statute and of the administrative ruling made pursuant thereto; see report of the published opinion below, page 580.

The appellant has overlooked several important considerations:

(1) The statute is the expression of a well settled policy of the Commonwealth to eliminate grade crossings. This might be done at the sole expense of the

railroads. The power of the Commonwealth has been most considerately exerted as respects sharing the cost and also as respects the gradual perfection of the policy, as the public safety demands in the sound official judgment of the administrative department having control and supervision of the highways of the State.

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts;" *Missouri, etc., Ry. Co.* v. *May,* 194 U. S. 367.

(2) It is not necessary for notice and hearing to be accorded by the statute to prevent arbitrary, oppressive or confiscatory exercise of the power conferred by the statute upon the Highway Commissioner; because if the power is abused "equity's long arm will stay his hand," as is said in the published report of the opinion in the case in the lower court on page 582.

And to the citations of authority for this proposition there stated, should be added *Lehigh Valley R. Co. v. Board,* 278 U. S. 24, from which we quote as follows (page 35):

> "It is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined, not only as violations of the Fourteenth Amendment, but also as forbidden by the Transportation Act.
>
> "* * * It was certainly not intended by the Transportation Act to take from the states or

> to thrust upon the Interstate Commerce Commission investigation into *parochial matters* like this, unless by reason of their effect on economical management and service, their general bearing is clear. *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713. The latter case makes a distinction between the local character of the usual elimination of grade crossings and the vital character from the standpoint of finance of the investment of large sums in the erection of a union station."

And from page 40:

> "But, if for any reason that remedy, as defined in those decisions should not be available, or be inadequate, it would seem to be clear that resort then might be had to the Court of Chancery."

It is submitted that the record presents no question arising under the Fourteenth Amendment of the United States Constitution, and that the motion to dismiss or affirm should be granted because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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